ANALYSIS OF PROPOSED CHANGES TO
FEDERAL RULES OF CIVIL PROCEDURE 26, 30 AND 34

I. Introduction

The Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed several amendments to the Federal Rules of Civil Procedure. This memorandum will analyze the proposed changes to Rules 26, 30, and 34. The primary changes to Rule 26: (a) mandate a uniform national rule requiring "early disclosure" of certain discovery materials; (b) limit the early disclosure to materials that support the disclosing party's claims or defenses; (c) change the definition of presumptively discoverable materials from materials relevant to the subject matter of the litigation to materials relevant to the claims and defenses alleged; and (d) emphasize the court's ability to limit discovery. Rule 30 would be changed to impose a seven hour limitation on depositions. The primary change to Rule 34 is to emphasize that the court can shift the cost of document production when the requested documents fall within the parameters of Rule 26(b)(2)(i-iii).[1]

The reasons for the proposed changes are set forth in a June 30, 1998, Report of the Advisory Committee on Civil Rules ("Advisory Committee Report" or "Report"). The Report heavily relies upon a November 1997 Survey from the Federal Judicial Center entitled "Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel and Closed Federal Civil Cases" ("FJC Survey"). The Report also cites a study by the RAND Institute for Civil Justice entitled "Discovery Management: Further Analysis of the Civil Justice Reform Act Evaluation Data" ("RAND Analysis"). The RAND

[1] Rule 26(b)(2)(i-iii) covers situations where a request is unreasonably cumulative, where the party already has had ample opportunity to obtain the information sought, or where the burden or expense of the discovery outweighs its likely benefit.

Analysis, performed at the request of the Advisory Committee on Civil Rules updates a 1996 RAND report on the effects of the Civil Justice Reform Act of 1990.[2] The FJC Survey was a national survey mailed on May 1, 1997, to 2,000 attorneys in 1,000 closed civil cases. There were survey returns from 1,178 attorneys. Thus, the FJC Survey had significant data based upon the 1993 discovery rule amendments. The RAND Analysis was an updated analysis of earlier data most of which was from cases filed before the 1993 amendments.

Both the FJC Survey and the RAND Analysis support the following conclusions:

1. The evidence indicates a surprising lack of discovery problems, in terms of both cost and attorney perceptions. The Survey's own conclusion is that discovery costs are very reasonable relative to the amount at stake in litigation and, in the overwhelming majority of cases, there is little or no extra expense due to discovery problems.

2. There is no consensus supporting imposition of a national standard of early disclosure.

3. There is no data and, in fact, there has not even been an attempt to study the effects of: (a) limiting early disclosure to materials that support the disclosing party's claims or defenses; (b) limiting discovery to materials relevant to a claim or defense; or (c) shifting costs of document production in certain instances.

4. Only a minority (27%) of the respondents to the FJC survey recommended revising the Federal Rules to further control or regulate discovery. FJC Survey at 47. As to each type of proposed change, a majority (and usually an overwhelming majority) of respondents indicated that the change will not decrease litigation costs generally or in the specific case

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[2] Both the RAND Analysis and the FJC Survey can be found in 39 Boston Col. L. Rev. 517-840 (1998).

surveyed.

More disconcerting is that the Advisory Committee Report consistently stretches the evidence to support its recommendations. The RAND Analysis warns that subjective answers tend to show a positive bias. 39 Boston Col. L. Rev. at 619. Yet, the Advisory Committee consistently relies upon subjective answers and ignores objective data.[3] The Advisory Committee appears to be giving heavy weight to anecdotal evidence by an "elite" group of "national" attorneys who are involved with the Committee and who apparently have testified in front of the Committee, again ignoring the objective (and even subjective) evidence of the FJC and RAND studies.

The introduction to the Advisory Committee Report is replete with statements that are grossly exaggerated and directly contrary to the evidence such as the following:

> "83% of those responding wanted changes made to discovery rules. . . ." Report at 3.
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> "There was an overwhelming and emphatic support for national uniformity of the discovery rules, and almost all commentators favored the elimination of the local options afforded by Rule 26. There was substantial disagreement, however, on what the national rule should be." Report at 3.
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> "It was generally believed that discovery costs could be reduced without eroding full disclosure by adopting presumed limits on the length of depositions and on the scope of discovery, particularly in connection with the production of documents." Report at 3.
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> Early disclosure should be limited to information that supports the disclosing party's claims or defenses to respond to one of the "fundamental objections" to early disclosure. Report at 7.
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> "Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine." Report at 10.

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[3] For example, as set forth below, the Advisory Committee relies on attorneys' perceptions of what effect a change generally may have but ignores hard data from multivariate analysis or ignores data on how particular cases were affected.

> "[P]rotests about excessive document production demands continue to be the most regular and vehement source of discovery complaints." Report at 13.

The Appendix to this memorandum sets forth the specific evidence that indicates that each of the above statements is just plain wrong.

The Report states that plaintiffs are most concerned about the length of depositions and defendants about the scope of document requests, implying that the proposed changes make a fair trade-off between limiting deposition time and limiting document production. See, e.g. Report at 4. In fact, neither the length of depositions nor the scope of document production has proved to be a significant problem, and there is no indication that either plaintiffs or defendants desire a trade-off. The FJC Survey indicates that only 12% of respondents thought depositions took too long, and only 4% thought there were too many depositions. FJC Survey at 33-34.

Similarly, in only 15% of those cases which had "problems" with document production were the problems attributed to requests for excessive numbers of documents. There were document production problems in 44% of cases, but 76% of the problems were due to failure to respond, late responses, vague requests, or production of excessive or disorderly materials. FJC Survey at 20, 35. In sum, document requests were excessive in 6.6% (15% of 44%) of the cases![4]

Finally, the FJC Report states that, in the average case, discovery costs represent about 50% of litigation expenses. Since most cases do not go to trial, what this means is that motion practice and pre-trial matters other than discovery are taking up an extremely large percentage of litigation expense.

II. The Evidence Is That Discovery Costs Are Not Too High And Excessive Document Requests Are A Problem In Only A Small Percentage Of Cases

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[4] The Survey does not indicate whether objections solved the problem.

Specific findings of the FJC Survey indicate an overwhelming consensus that discovery costs are about right. The Survey stated:

> These data suggest that the typical case has rather modest litigation expenses – particularly relative to stakes. . . – and that discovery expenses are a sizeable but not surprising proportion of these expenses.

FJC Survey at 15.

Discovery expenses typically are only 3% of the estimated "stakes". FJC Survey at 16. Relative to stakes, 54% of the Survey respondents thought that discovery expenses were about right and 20% thought they were low. In other words, a total of 74% of respondents perceived no problem with the costs of discovery. **Only 9% thought that the discovery process generated too much information, 69% thought that the amount of information generated was right, and about 8% thought that too little information was generated**. FJC Survey at 18-19. While the Survey responses indicate that 4% of total litigation expenses are attributable to discovery problems, multivariate analysis did not suggest that the incidence of discovery problems was associated with litigation costs. FJC Survey at 5. The Survey estimated that attorneys thought that about 9% of all discovery expenses were incurred unnecessarily as a result of problems in discovery. FJC Survey at 22.

Even in those cases that had a discovery "problem" (48% of cases[5], FJC Survey at 19), the most common problems were intentional delays or complications (55%), lack of cooperation by a client (46%) and incompetence of counsel (41%). Pursuit of discovery disproportionate to the needs of the case was a problem in 38% of those cases with discovery problems; therefore, pursuit of disproportionate discovery occurred in just 18% of all cases. FJC Survey at 9, 40.

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[5] The Survey indicates that 58% of defense lawyers and 42% of plaintiffs' lawyers reported no problems. FJC Survey at 19.

Yet even this does not show whether the disproportionate pursuit of discovery was obviated by objections or the like.

As to document production (which generated the highest rate of reported problems), **requests for excessive numbers of documents were a problem in only 15% of those cases (44%) that had document production problems, or 6.6% of all cases**. The primary problems with document production were failure to respond adequately (28%) and failure to respond in a timely fashion (24%). FJC Survey at 35.

When asked about the specific cases surveyed, attorneys reported that there would have been little decrease in expense if discovery were more limited by rule. For example, insignificant percentages of attorneys thought that expenses in their case would have been decreased by narrowing the definition of what documents were discoverable (11%), limiting the maximum hours for a deposition (9%), and limiting the number of depositions (7%). FJC Survey at 44.

The Survey performed regression analysis to identify variables that correlated with total litigation costs, finding that district initial disclosure rules were <u>not</u> associated with increased or decreased litigation costs. Similarly, case management variables and "reported problems" variables were not associated with increased or decreased litigation costs. The primary cost variable was the amount at stake in the litigation. FJC Survey at 54. These conclusions also were supported by the RAND Analysis that found that discovery expense was not a problem in the typical case. Niemeyer, *Here We Go Again: Are The Federal Discovery Rules Really In Need of Amendment*? 39 Boston Col. L. Rev. at 522. Thus, it is not surprising that only 27% of attorneys responding to the Survey recommended further revisions to the Federal Rules. FJC Survey at 47.

What does appear is that a so-called "elite national bar" has presented anecdotal evidence at hearings of the Advisory Committee, and various Bar committees and the Advisory Committee

itself have searched for a mission. Garth, *Two Worlds of Civil Discovery: From Studies of Cost and Delay to the Markets in Legal Services and Legal Reform*, 39 Boston Col. L. Rev. 597, 692. As explained by University of Texas law professor Linda Mullenix, the evidence suggests at most "that complex, high stakes litigation, handled by big firms with corporate clients, are the cases most likely to involve the kind of problematic discovery that skews the discovery debate." Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 Boston Col. L. Rev. at 685. As Mullenix points out, the evidence is largely anecdotal and attorneys' and judges' subjective opinions. There has been no study of the particular proposed rule reforms that have been circulated by the Advisory Committee. Id. at 684. Mullenix concludes that "the data suggest that the best prudential course is to do nothing." Id. at 688-689.

III. The Proposal To Make Mandatory Early Disclosure A Uniform National Rule Did Not Receive "Widespread Support"

The Advisory Committee has proposed to amend FRCP 26(a)(1) so that district courts would no longer be able to opt out of the initial disclosure provisions pertaining to witnesses, documents, and damages. The initial disclosure provisions were hotly contested in 1993 and prompted a dissent by Justice Scalia, joined by Justices Thomas and Souter, to the Supreme Court's approval of this provision. Justice Scalia cited "nearly universal criticism from every conceivable sector of our judicial system." 61 U.S. L.W. 40, 108 (April 27, 1993).

The Advisory Committee Report now asserts that there is "widespread support" for a uniform rule and that uniformity is the second most desired cost-fighting tool. Report at 49. **In fact, 57% of those responding to the FJC Survey wanted to eliminate early disclosure (27%) or permit local option (30%). FJC Survey at 47-48**. The Survey did not ask respondents to choose between national uniformity and local option. Instead, respondents were

given three options: (1) a uniform national early disclosure requirement; (2) a uniform rule prohibiting early disclosure; or (3) local option. Thus, the Report's reference to "widespread support for uniformity" apparently includes both early disclosure supporters and detractors. To say that there is "wide-spread support" for uniformity, assumes without support that those who chose option 2 (a uniform rule prohibiting early disclosure) would have chosen option 1 (a uniform national early disclosure requirement) if they had to choose solely between options 1 and 3 (local option).

The Report states that lawyers ranked a uniform national disclosure rule as "second among proposed rule changes . . . as a means to reduce litigation expenses without interfering with fair outcomes." Report at 49. **While a uniform national disclosure rule was the second most desired, even the most desired change (increased availability of judges), received just an 18% favorable response. FJC Survey at 44**.

Only 17% of those surveyed thought a uniform national rule requiring initial disclosure would have decreased their expenses in the actual case surveyed and only 12% thought that deleting initial disclosure from the national rules would have decreased expenses in the actual case surveyed. The Survey also indicated that 44% of those responding believed a uniform national rule requiring initial disclosure would decrease expenses generally and that 31% believed that deleting initial disclosure from the national rules would decrease expenses generally. However, the Survey stated that "the experience of the attorneys in actual cases, may reflect more realistically the frequency with which the hoped-for effects would materialize." FJC Survey at 44-45.

Stated differently, 83% of those surveyed did not believe that a uniform national

rule requiring initial disclosure would have decreased expenses in their particular case and 56% did not believe that such a rule would decrease expenses generally. Similarly, 88% did not believe that deleting initial disclosure from the national rules would have decreased expenses in their case and 69% did not believe that such a change would generally decrease expense. FJC Survey at 44.

More importantly, the Survey did a multivariate analysis of various data, concluding that "**[d]istrict initial disclosure variables were not associated with increased or decreased litigation cost**." FJC Survey at 54 (emphasis added). The Survey did state that disposition time was lower in cases in which initial disclosure was reported to have been used, but did not indicate how much lower. Report at 55. No explanation is given as to why disposition time was lower but costs were not. The RAND Analysis found no correlation between initial disclosure and disposition time, although this was based upon cases that largely were filed prior to the 1993 amendments. 39 Boston Col. L. Rev. at 660-661.

IV. The Effects of Limiting Early Disclosure To Material That Supports A Party's Claims or Defenses Was Not Studied

The Advisory Committee Report states that there are "fundamental objections" to forcing parties to make early disclosure of materials "that are relevant to disputed facts alleged with particularity in the pleadings." FRCP 26(a)(1). The Report proposes limiting the early disclosure to materials "that support [the disclosing party's] claims or defenses."

The Survey did not specifically question attorneys about the desirability of this change. Even though the Survey repeatedly asked attorneys to identify other problems not specifically surveyed, there is no indication in the Survey that attorneys identified disclosing all "relevant" materials as fundamentally objectionable.

The proposed limitations to FRCP 26(a)(1) also must be viewed in light of the results of the Survey that indicated that the overwhelming majority of attorneys did not believe that the scope of discovery should be further limited. See Section (V), *infra*.

V. Limiting Presumptively Discoverable Materials To Materials Relevant To The Claims and Defenses Alleged

The Advisory Committee proposed amending FRCP 26(b)(1) to change the definition of presumptively discoverable materials from materials relevant to the "subject matter involved in the pending action" to materials relevant to "the claim or defense." The Court can permit discovery of information "relevant to the subject matter involved in the action" for good cause.

There has been no attempt to study this proposed change. A minority of survey respondents (31%) said that narrowing the definition of what is discoverable would generally decrease discovery expense but an even smaller minority (12%) said doing so would have reduced expense in the actual cases surveyed. FJC Survey at 44. The Survey goes on to say the numbers in actual cases "may reflect more realistically the frequency with which the hoped-for effects would materialize." FJC Survey at 45.

Thus, the Survey indicates that 69% of attorneys (the converse of 31%) did not believe that narrowing the definition of what is discoverable would even generally reduce expenses.

These results also must be read in light of other findings of the Survey: only 9% of those surveyed thought that the discovery process generated too much information; 69% thought that the amount of information generated was about right; and 8% thought that too little information was generated. FJC Survey at 18-19. Similarly, with respect to document requests, excessive

document requests were made in only 6.6% of the cases surveyed.[6] Furthermore, 4% of litigation expenses were attributed to discovery problems, but multivariate analysis did not suggest a correlation between discovery problems and litigation costs. FJC Survey at 5.

VI. Amending FRCP 26(b)(1) To Add A Reference To FRCP 26(b)(2)(i-iii) Is Necessary

The Advisory Committee proposed adding a section to FRCP 26(b)(1) stating that all discovery is subject to the limitations imposed by subdivisions (b)(2)(i-iii). These provisions provide that the Court may limit discovery that is unreasonably cumulative, can be achieved through a less burdensome means, where there has already been ample opportunity for discovery, or where the burden and expense outweighs the likely benefit. These provisions are already contained within (b)(2).

The proposed addition to (b)(1) is redundant, unnecessary and insulting. Courts already have the powers and all discovery already is subject to the limitations in (b)(2). Furthermore, there is no support for this amendment. Once again, the Report ignores the overwhelming data that most discovery is appropriate and that discovery costs are in line with the stakes of the litigation.

VII. The Seven Hour Deposition Limit

The Advisory Committee proposes limiting depositions to a seven hour day. This new proposal would be included within FRCP 30(b)(2). Once again, there is no support for this proposition.

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[6] The 6.6% is computed as follows. There were document production "problems" in 44% of the cases that had document production activity. FJC Survey at 20. However, in only 15% of those 44% was the problem as excessive number of documents being requested. Taking 15% times 44% yields 6.6%.

Only 12% of the Survey respondents said that depositions took too long. FJC Survey at 33. Perhaps most importantly, only 4% said there were too many depositions. FJC Survey at 34. Only 9% of attorneys thought that limiting the maximum number of hours for a deposition would have decreased expenses in the particular cases surveyed and only 27% thought that the limitation would decrease expenses generally. FJC Survey at 44. Respondents were not asked to evaluate a seven hour limit.

VII. A New Cost-Shifting Provision in Rule 34 Is Unnecessary

The Advisory Committee proposes an addition to Rule 34 authorizing the court to order the party seeking discovery to pay part or all of the expenses incurred by the responding party in order to implement the limitations of FRCP 26(b)(2)(i-iii). These are the provisions permitting the Court to limit cumulative discovery, to limit discovery where the party has had an ample opportunity to inquire, and to limit discovery where the burden or expense outweighs the likely benefit.) Once again, the proposed change is unnecessary and without support.

Courts already have the power to do what is proposed. The reason the Courts may not be exercising the power more often is that, in most cases, the amount of discovery is reasonable, as the Survey repeatedly indicates.

The Report cites the Survey as indicating that "'[o]f all the discovery devices we examined, document production stands out as the most problem-laden.'" Report at 67. However, the problem laden parts of document production were almost exclusively related to failure to respond, late responses, vague requests, or production of superfluous or disorderly materials; 76% of the problems were in one of these categories. FJC Survey at 35. Requests for excessive documents were cited as the problem in only 15% of those cases which had document production

(44% of the cases surveyed). Moreover, there is no indication as to the number of cases where requests for excessive documents were dealt with via an objection.

APPENDIX

1. Claim in Report: "83% of those responding wanted changes made to discovery rules. . .." Report at 3.

   Evidence:

   I have not found the 83% figure in the Survey. The 83% figure appears to be an aggregation of those respondents who gave favorable responses to proposals providing for better access to judges, greater uniformity of discovery rules, greater sanctions for abuse, and adoption of a code of civility. In fact, the only two categories favored by a majority of respondents were increasing court management and availability of judges (63%) and increasing sanctions (62%). In other words, a majority of those responding do not support other proposed changes such as limits on time or amount of discovery, adopting a uniform rule of initial disclosure, or changing the scope of discovery. FJC Survey at 46-47. No individual proposed change received anything close to 83% support

   More significantly, these percentages are based upon attorneys' subjective views of what generally would happen if the changes were made. When asked about the effect of the changes in the actual cases that the attorneys handled, only a small minority believed that the proposed changes would have decreased expenses in their case. In sum, anywhere from 82% to 93% of the attorneys surveyed did not believe that a particular proposed change would have decreased expenses in their case. FJC Survey at 44.[7] The highest percentage (18%) believed that increased availability of a judge to resolve discovery disputes would have decreased expenses. The second highest percentage (17%) believed that adopting a uniform national rule requiring initial disclosure, would have decreased expenses in the particular cases they had handled.

2. Claim in Report: "There was an overwhelming and emphatic support for national uniformity of the discovery rules, and almost all commentators favored the elimination of the local options afforded by Rule 26. There was substantial disagreement, however, on what the national rule should be." Report at 3.

   Evidence:

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[7] The Survey itself says that the specific case data is more realistic. FJC Survey at 45.

To the contrary, 57% of those responding to the FJC Survey wanted either to eliminate early disclosure (27%) or permit local option (30%). FJC Survey at 47-48. The Survey did not ask respondents to choose between national uniformity and local option. Instead, respondents were given three options: (1) uniform national early disclosure requirement; (2) a uniform rule prohibiting early disclosure; or 3) local option. Thus, there was no "up or down" question on uniformity. The responses also must be read in conjunction with those regarding whether a uniform national rule would decrease expense. An overwhelming majority (83%-88%) said it would not have decreased expense in their specific case and a majority (56%-69%) said it would not generally decrease expenses. FJC Survey at 44. There is absolutely no indication in either the FJC Survey or the RAND Analysis that there is "an overwhelming and emphatic support for national uniformity." Report at 3.

3. Claim in Report: "It was generally believed that discovery costs could be reduced without eroding full disclosure by adopting presumed limits on the length of depositions and on the scope of discovery, particularly in connection with the production of documents." Report at 3.

Evidence:

The Survey does not reveal such a general belief. A majority of attorneys rejected the conclusion that discovery costs could be reduced by limiting the length of depositions or the scope of discovery. Only 31% believe generally that narrowing the definition of what is discoverable would decrease expense, and only 27% believe limiting the maximum number of hours for depositions would decrease expenses. When asked about their actual cases, only 12% believe that narrowing the definition of what is discoverable and only 9% believe that limiting deposition time would have decreased expenses in their cases. FJC Survey at 44.

4. Claim in Report: Early disclosure should be limited to information that supports the disclosing party's claims or defenses to respond to one of the "fundamental objections" to early disclosure. Report at 7.

Evidence:

There is no indication in the FJC Survey that this was a fundamental objection of attorneys. The Survey did not even ask this question. Although the Survey gave attorneys plentiful opportunities for "write-in" objections, there is no indication that respondents independently raised this as an objection. There also is no evidence that this proposed change would decrease expense.

5. Claim in Report: "Twenty years of failure to reduce worrisome discovery problems to tolerable levels may justify resort to stronger medicine." Report at

10.

Evidence:

An overwhelming 74% of respondents thought that discovery expense was about right or low. FJC Survey at 4, 18. Typical discovery cost is 3-4% of the amount at stake. FJC Survey at 5, 16. The FJC Survey concluded that discovery problems add 4% to the cost of litigation. FJC Survey at 2, 5. Where there were discovery problems, intentional delays were the most common cause of the problems (55%). FJC Survey at 9. Yet, the proposed changes do not address intentional delays.

6. Claim in Report: "[P]rotests about excessive document production demands continue to be the most regular and vehement source of discovery complaints." Report at 13.

Evidence:

Only 9% of the respondents thought that discovery generated too much information, with 69% saying about the right amount of information needed for a fair resolution was produced and 8% saying too little information was produced. FJC Survey at 18-19.